

The proceeds of such sale in my view would be nothing but income from capital which attracts income tax because the rights given to the purchaser and the consequences or incidents of their ownership of the estate which they still retain.

The *Hudson's Bay Company's* case and the case of *Taylor v. Good* establish a principle that where a taxpayer owns or buys a property without intention to re-sell it, subsequent sale of the property does not constitute an adventure in the nature of trade but a mere disposal of his capital. Thus, it was held that the *Hudson's Bay Company* was not engaged in buying and selling land when it sold lands which it acquired from the Canadian Government in exchange of surrendering its rights of government and some other lands belonging to it. Further, in *Taylor v. Good* it was held that the taxpayer who was a business retailer was also not engaged in buying and selling land when he sold a house together with its compounds which he earlier acquired for the purpose of residing therein. Since the property sold was not acquired for the purpose of re-selling, the subsequent sale would not make the sale an adventure in the nature of trade. In the present appeal, I do not think that the acquisition of the estate by the appellants could be regarded as otherwise than an acquisition for the purpose of adventure in the nature of trade. It is accepted by the appellants themselves in the agreed statement of facts that they are rubber growers and timber merchants and dealers. The acquisition of the estate as well as dealing with the estate including the sale of the standing timber in 1971 are, in my view, nonetheless an adventure in the nature of trade. What they were doing were completely authorised by their Memorandum and Articles of Association. Furthermore, unlike the *Hudson's Bay Company's* case, the appellants are a statutory company which are different from an individual and a chartered company; the position of the latter being assimilated to that of an individual (*Hudson's Bay Company's* case: page 435). In *Taylor v. Good*, the taxpayer was an individual whose business was not dealing in land at all and the Crown accepted that the acquisition of the property which was sold subsequently was not an adventure in the nature of trade. In the present appeal, however, the Special Commissioners did not find that the estate was not acquired for purposes other than trade or adventure in the nature of trade. Therefore, in my view, neither the case of *Hudson's Bay Company* nor the case of *Taylor v. Good* are applicable to the present appeal. The Special Commissioners said:—

"...It is also true that on the evidence it was so far an isolated transaction as regards the sale of timber. But in view of the material facts relating to the nature of the land, its retention as a source of timber, the permanent closing down of the rubber planting business, the subdivision of the land, the carrying out of two of the business objects in the Memorandum of Association by a trading company, the previous logging by the purchaser under the agreement, the maturity of the trees, the rather short three year period and last but not least the previous business of rubber planting, all these taken together point unswervingly to the first 'plunge in the waters of trade' namely an adventure in the nature of trade in so far as the timber trade is concerned. See *International Investment Ltd. v. C.G.I.R.*⁽²⁾ as to the general principle. On the evidence before us it is not unlikely for future plunges to be taken in view of the fact that the lease is for 999 years. Indeed if we were to take into account the first business of rubber planting it is the second plunge and the *American Leaf*

Blending Case shows that business is business no matter a change from one to the other."

It seems to me that the approach taken by the Special Commissioners in coming to their conclusion was fully justified in law, viz.: one has to look at firstly the Memorandum and Articles of the Company, secondly what the company did at its inception and subsequently, and finally at all other circumstances. (See Finlay J. in *St. Aubyn Estate Limited v. Strick*⁽³⁾ at page 419). Having regard to the appellants' memorandum and articles, and to what they did from the moment they acquired the estate to the time when they sold the standing timber on the estate, their activities, to use the words of Viscount Simonds (in *Edwards v. Bairstow*⁽⁴⁾ at page 225) can be said to be leading "to the maturing of the asset" and the sale must be an adventure in the nature of trade, and once the transaction has the badge of trade, the fact that it is an isolated case does not prevent the transaction from being in truth an adventure in the nature of trade (see Lord Radcliffe in the same case at page 230).

Consequently, there can be no other apt description which could be given to the sale transaction by the appellants of the standing timber in 1971 than that they were engaged in commercial transaction or in an adventure in the nature of trade. Since only the timber was sold and not the land, and as the sale was such that the timber had to be cut immediately, the finding and the conclusion of the Special Commissioners are therefore correct. The timber sold are not capital assets and the receipts are not capital receipts but revenue receipts subject to income tax.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Skrine & Co.*

MOHAMED BIN ABDULLAH v. PUBLIC PROSECUTOR

[A.Cr.J. (Harun J.) October 12, 1979]

[Kuala Lumpur Criminal Appeal No. 45 of 1979]

Criminal Law and Procedure — Summary trial — Absence of counsel — No miscarriage of justice — Federal Constitution, Art. 5(3).

Constitutional Law — Right to counsel — Summary trial in absence of counsel — No miscarriage of justice — Federal Constitution, Art. 5(3).

In this case the appellant had been charged with criminal breach of trust under section 409 of the Penal Code. At the date of hearing of the case, counsel for the accused was not present as it appeared that he had urgent business in Johore Bahru relating to a land matter. The learned President of the Sessions Court proceeded with the hearing in the absence of counsel. After the appellant had been called for his defence, a second counsel appeared and after consulting his client, informed the court that he had advised him to remain silent. The appellant was convicted and sentenced to 18 months' imprisonment. The appellant appealed. The main grounds of appeal were that the learned President erred in proceeding to hear and determine the case without the presence of defence counsel and in making the accused conduct his own defence.

Held: (1) on the facts of this case there had been no mis-

carriage of justice. The trial was proper and the absence of counsel did not vitiate the trial;

(2) the appeal against conviction and sentence must be dismissed.

Cases referred to:-

- (1) *Palaniappa Chettiar v. Arunasalam Chettiar* F.M. Civil Appeal No. 34 of 1958; [1961] M.L.J. xxxiii; see 4 M.C. 294.
- (2) *Bakar bin Ahmad v. Public Prosecutor* (1968) 4 M.C. 294.
- (3) *Mohamed Ekram v. Public Prosecutor* [1962] M.L.J. 129.
- (4) *Lee Fook Sam v. Public Prosecutor* [1963] M.L.J. 371.

[The following case was also cited in argument; *R. v. Sussex Justices* [1924] 1 K.B. 256.]

CRIMINAL APPEAL.

Franklin Goonting for the appellant.

T.S. Sambanthamurthi (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Harun J.: The appellant was charged in the Sessions Court with criminal breach of trust under section 409 of the Penal Code. The case was simple enough. The various post offices in the vicinity of Kuala Lumpur sent their daily cash collections to the General Post Office. The appellant was the cashier at the General Post Office and his duty was to receive the cash and issue receipts to the Post Masters who had sent in the cash. He would then bank in the money. Between March 17, 1977 and April 23, 1977, the appellant received a total sum of \$624,139.19 in this way but banked in only \$621,939.19. He was short of \$2,200. All the transactions were documented and at the trial no less than 150 documents were produced by 23 witnesses to prove the prosecution's case. On a review of the evidence I am satisfied that the prosecution had established a *prima facie* case which if unrebutted would warrant the appellant's conviction. When called upon his defence, the appellant exercised his right of remaining silent whereupon the learned President convicted him of the offence and sentenced him to 18 months' imprisonment.

The grounds of appeal against conviction are not on the findings of fact by the learned President but with regard to the conduct of the trial as a whole, viz.:

- "a) The learned President erred in proceeding to hear and determine the case without the presence of defence counsel.
- b) The learned President erred in making the accused conduct his own defence.
- c) The learned President failed to take into account the fact that the Prosecution itself was not ready to proceed with the trial since the complainant had not then been subpoenaed."

The record shows that the appellant first appeared in court on August 5, 1977 and hearing was fixed for May 8, 1978. The appellant appeared in court on that day with counsel but the prosecuting officer said that he had 27 witnesses and it would not be possible to complete hearing in one day. The hearing was then adjourned to January 29-31, 1979.

Four days before the trial date, however, the Magistrate transferred the case to the Sessions Court as the Magistrate had by then no jurisdiction to try the case. The learned President fixed hearing from

A April 9 to 12, 1979 "as being the earliest dates available to counsel".

On the first day's hearing, the appellant appeared in person and informed the court that his counsel had gone outstation. The prosecution had also not subpoenaed the complainant and so the learned President adjourned hearing to the following day. The learned President also informed appellant that unless there was a valid reason for his counsel's absence the following day he would have to conduct his own defence.

Counsel did not appear the following day but the appellant produced a photostat copy of a letter purported to have been written by his solicitors to the court and the prosecuting officer that counsel had to attend to some urgent business in Johore Bahru and requested for an adjournment. Neither the court nor the prosecuting officer received any such letter.

In her grounds of judgment, the learned President said that she had "taken great pains that the new dates of hearing were convenient to counsel". She also took into account that the appellant was a Government servant who had been interdicted from duty from August 1, 1977 and since counsel had not given a reasonable explanation for the absence she proceeded with the trial.

On the second day of the hearing, another counsel appeared on behalf of the first counsel and requested for a postponement. It appeared that the first counsel could not appear in court because the urgent business in Johore Bahru related to a land matter. The learned President considered this was not a sufficient ground to adjourn the hearing. She refused the application and continued with the trial.

When the learned President called upon the appellant to make his defence, the second counsel reappeared and applied for a few minutes adjournment. When the trial resumed, he informed the court that he had taken over the defence and had advised the appellant to remain silent. The learned President convicted the appellant and counsel said he was not making a plea in mitigation.

The question is whether the court could proceed with the trial in the absence of counsel and if not whether the trial was a nullity. Before going into the legal issues of this question it may not be out of place here to bear in mind the background situation at the Subordinate Courts in Kuala Lumpur. During the last three months alone, the hearings of 500 criminal cases at the courts there were postponed on the ground that counsel was engaged elsewhere, the majority being that counsel was engaged in some other court, be it the Federal Court, the High Court, the Sessions Court or another Magistrate's Court. The actual figures are:

I	July	149 cases
	August	144 cases
	September	207 cases

It is common knowledge that there is a backlog of cases waiting to be heard and if a large number of cases are regularly postponed, the backlog will only get worse no matter how many more new Magistrates

are appointed. The truth of the matter is that more courts have been established recently to speed up trials and counsel find themselves in more than one court at the same time. The general principle of course is that trial dates should be fixed at the convenience of the court. This is the only way some order can be maintained so that courts sit regularly and public funds are not wasted on empty court rooms with paid staff. For the system to work effectively and efficiently, the prosecution must be ready to proceed with the trial on the appointed dates and defence counsel should not accept a brief if he is already engaged in another court on the same day. In practice, trial dates are fixed well in advance giving ample notice to all concerned and there is no reason why most cases should not be heard on schedule except in the rare case where death or sudden illness has intervened, in short when a trial has been frustrated by some act of God. In the instant case counsel had more than two months' notice of the trial and what was more the dates were fixed to suit counsel's convenience. Unless courts are in full command of their proceedings, the administration of justice will be chaotic and respect for the law that much diminished. In any organisation where a body of men gather together for a common purpose there must be discipline and an acknowledged leader. In a Court of Law, the Bench must necessarily and logically assume leadership and enforce discipline. It can never be otherwise. This in part explains the attitude of the learned President in the conduct of this case.

What then of the legal position? Article 5(3) of the Constitution reads:

"Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice."

In *Palaniappa Chettiar v. Arunasalam Chettiar*⁽¹⁾ the Chief Justice said:

"It is wrong to say, as is frequently said, that a litigant is entitled to be represented by the counsel of his choice. The true statement is that he is entitled to be represented by the counsel of his choice if that counsel is willing and able to represent him." [1961] M.L.J. xxxiii.

This passage was quoted with approval by Sharma J. in *Bakar bin Ahmad v. Public Prosecutor*⁽²⁾ and cited in *Jayakumar's Constitutional Law Cases* from Malaysia and Singapore at page 107A. In that case the only ground of appeal was that the learned President of the Sessions Court did not allow the appellant to be represented by his counsel and that this had caused a failure of justice.

With respect, I agree with the aforesaid interpretation of Article 5(3) of the Constitution in so far as it concerns an accused person's right to counsel. The right is only to choice of counsel who is willing and able to act. It does not confer a right to counsel in every case, that is to say, it does not mean that an accused person cannot be tried unless he is represented by counsel which is what the appellant is in substance contending. That is the position in the United States where the Sixth Amendment to the U.S. Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defence."

It is the duty of an accused person to attend

court when called upon and any obligation on counsel arises by reason of the contract between himself and his client. If counsel is absent on the date of the trial that is a matter between client and counsel. Article 5(3) of the Constitution does not in any way restrict the power of the court to fix any date for the hearing of a case nor does it prohibit the court from hearing the case in the absence of counsel who has been retained.

In the final analysis, the question is whether there has been a failure of justice. In *Mohamed Ekram v. Public Prosecutor*⁽³⁾ counsel became ill on the day of the trial and applied (with a medical certificate) for an adjournment but the court refused it on the grounds that "there had been many postponements already". There had been several postponements before counsel were engaged but there was nothing in the record to indicate at whose request they were made. Since counsel were engaged there had also been several adjournments until the case was finally fixed for hearing. On appeal, the judge ordered a retrial but held:

"I do not however intend this to be regarded as a precedent or to give the impression that an application for adjournment should automatically follow the production of a medical certificate from counsel. Each case should be considered on its merits."

In *Lee Fook Sam v. Public Prosecutor*,⁽⁴⁾ the appellant retained counsel who withdrew from the case before the trial. As it was a capital case, the court assigned him counsel but at the commencement of the trial he informed the court that he was dissatisfied with that counsel and applied for an adjournment to engage new counsel. The court adjourned the case for two weeks. On the third day of the trial the new counsel informed the court that the appellant had withdrawn his instructions and he withdrew from the case. The appellant applied for another adjournment to engage yet another counsel but the court refused it and proceeded with the trial without counsel. On appeal, the Court of Appeal held that the request for the second adjournment was unreasonable and was properly rejected. Further, in the circumstances of that case the appellant was in no way prejudiced.

I am satisfied that there has been no miscarriage of justice in this case in spite of counsel's absence. The evidence related entirely to the appellant's daily routine at his place of work. The learned President recorded very detailed evidence and gave the appellant every opportunity to cross-examine the witnesses and explain his rights at the trial. I can find no grounds to interfere with the learned President's finding of guilt.

For these reasons, I hold that the trial was proper and that the absence of counsel did not vitiate the trial. The appeal against conviction is therefore dismissed.

The appellant also appeals against sentence on the grounds that the court did not take into consideration his long service with the Government. As this offence carries a maximum penalty of 20 years' imprisonment it cannot be said that a sentence of 18 months' imprisonment is manifestly excessive in the circumstances of this case. The appeal against sentence is therefore dismissed.

Appeal dismissed. Conviction and sentence confirmed.

Appeal dismissed.

Solicitors: *Halim Ismail & Co.*

**TAN CHIN KIM SAWMILL AND FACTORY
SDN. BHD. & ANOR. v.
LINDETEVES-JACOBBERG (M) SDN. BHD.
& ANOR.**

[O.C.J. (Abdoolcader J.) September 26-28, November 7-9 & 14,
1978, January 16-18 & 23-25, November 13-15, 1979 &
March 6, 1980]

[Ipoh — Civil Suit No. 137 of 1977]

Commercial Law — Lease financing for industrial equipment and machinery — Leasing — Guarantee — Machinery delivered — Whether property passes — Breach of contract — Damages — Bills of Sale Ordinance, 1950 — Sale of Goods (Malay States) Ordinance, 1957, ss. 19, 20 & 23 — Companies Act, 1965, s. 108.

Commercial Law — Equipment leasing.

Contract — Breach of contract — Guarantee — Damages — Measure of — Contracts Act 1950, ss. 74 & 93.

In this case the first plaintiff company owned a sawmill and the second plaintiff was the chairman of the company. The first plaintiff company required additional machinery to expand its operations and placed four orders with the first defendant for the supply of the machinery. Payment was stated in the orders to be by leasing to be arranged with a credit corporation. The leasing arrangements with the credit corporation fell through and the first plaintiff company through the second plaintiff then arranged for leasing facilities with the second defendant. It was agreed in effect that the first defendant would sell the machinery to the second defendant which would in turn enter into a five year lease of the machinery with the first plaintiff company subject to the first defendant guaranteeing all payments due to the second defendant under the leasing arrangement to be entered into by the first plaintiff company and indemnifying the second defendant against all loss, damage, costs and expenses incurred or suffered and purchasing the machinery on the termination of the lease. The first plaintiff company defaulted in its dues for the lease rentals after making two payments and eventually the second defendant terminated the lease agreement and the first defendant acting as agents for the second defendant repossessed the machinery. The first defendant pursuant to the agreements purchased the machinery and indemnified the second defendant against all loss, damages and expenses incurred in the sum of \$527,039.37. The plaintiff sought a declaration (a) that the documents relating to the lease are bills of sale and therefore void under the Bills of Sale Ordinance, 1950 and (b) that the lease documents were a sham and invalid and of no effect. At the trial the plaintiffs indicated that they would not proceed with the claim based on the Bills of Sale Ordinance, 1950. The first defendant counterclaimed for the sum of \$415,572.10 that is \$527,039.37 which it paid to the second defendant plus \$165,660.73 for loss and expenses incurred, less the sum of \$277,128.00 realised from the sale of the machinery.

Held: (1) there is no substance whatever in the contention of the plaintiffs that the first plaintiff was at any time the owner of the machinery in question or that the arrangement entered into to provide finance to the first plaintiff was otherwise than that the documents show it to be namely the provision of lease financing to the first plaintiff by the second defendant by way of a lease of the machinery by the latter which had purchased it from the first defendant. The claim of the plaintiffs to the effect that the documents are a sham because they were a device to cover a transaction whereby goods were given as security for a loan must accordingly fail;

(2) in regard to the counterclaim, the second defendant and in turn the first defendant was entitled to recoupment and to recover all loss naturally arising as a result of the breach of contract on the part of the first plaintiff. The first defendant was also entitled to recover for any damages or loss sustained by it beyond what it had to pay to the second defendant under the guarantee.

A Cases referred to:-

- (1) *Cheetham & Co. Ltd. v. Thornthum Spinning Co. Ltd.* [1964] 2 Lloyd's L.R. 17, 22-23.
- (2) *Ginzberg & Ors. v. Barrow Haematite Steel Co. Ltd. and McKellar* [1966] 1 Lloyd's L.R. 343, 351-353.
- (3) *Hadley v. Baxendale* (1854) 9 Ex. 341; 156 E.R. 145.
- (4) *Ex parte Bishop, In re Fox, Walker & Co.* (1880) 15 Ch. D. 400, 421-422.
- (5) *Omnium Insurance Corporation Limited v. United London and Scottish Insurance Company Limited* (1920) 36 T.L.R. 386, 387.
- (6) *Badeley v. Consolidated Bank* (1887) 34 Ch. D. 536, 556.
- (7) *Financings Ltd. v. Baldock* [1963] 2 Q.B. 104.

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CIVIL SUIT.

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N.T. Rajah for the plaintiff.

Peter Mooney (U. Harcharan Singh with him) for the first defendant.

P.P. Royan for the second defendant.

Cur. Adv. Vult.

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Abdoolcader J.: This case which I am told from the Bar is the first of its kind in the country involves lease financing for industrial equipment and machinery and revolves around an allegation by the plaintiffs that the arrangement effected is a sham and invalid and of no effect. Without for the moment meandering through the catacombs of pleadings and evidence, it will be necessary initially by way of background to synoptically outline the facts of the matter to show the arrangement ostensibly entered into and the relationship of the parties in this respect, but before doing so I should perhaps observe that this action which took some 18 days to hear has resulted in a profusion of evidence and entailed pleadings which prior to the hearing had without sanction or consent been amended by the parties of their own accord and filed out of time and therefore necessitating applications at the outset for leave to do so followed by re-amendments and further re-amendments time and again in the course of the trial right up to even the midstream stage of final addresses, and the augmentation of the four bundles of agreed documents tendered in the first instance into six not unbulky volumes as the hearing progressed. This case might therefore perhaps qualify as the first of its kind in another sense as well or at least as a very close runner-up in this field.

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The 1st plaintiff company owns a sawmill and carries on this business at Mambang Di-Awan, Kampar, Perak, and Tan Chin Kim, the 2nd plaintiff, was the chairman of the company and virtually its alter ego and voice and mind as he personally handled all matters relevant to this case for and on its behalf and in giving evidence generally and in particular in the use of personal pronouns in effect assumed the mantle of the 1st plaintiff and identified himself with it. The 2nd plaintiff unfortunately died on February 7, 1979 but happily after the completion of his evidence which I had taken steps to expedite because of the terminal illness he was suffering from. His son Tan Way Keat was then substituted to represent his estate for the purposes of this action but I shall continue to refer to the deceased as the 2nd plaintiff who it would seem was probably joined as a co-plaintiff only because of the charges over his own

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